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In the Supreme Court of the United States

OCTOBER TERM, 1985

CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in refusing to invalidate already-expired contracts that had been adopted by the Bonneville Power Administration (BPA) for the purchase of scheduling rights to the power generated by a nuclear power plant, co-owned by BPA and the other contracting parties, on the ground that petitioner had not shown that it or anyone else had been harmed by the execution of the contracts.

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OPINION BELOW

The majority opinion of the court of appeals (Pet. App. 1-10) is reported at 754 F.2d 1470. The dissenting opinion of Judge Norris (Pet. App. 11-13) was issued in full in the companion case of *Portland General Electric Co.* v. *Johnson,* which is reported at 754 F.2d 1475.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1985. A petition for rehearing was denied on May 2, 1985. The petition for a writ of certiorari was filed on July 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Bonneville Power Administration (BPA) is a self-financing power marketing agency within the United States Department of Energy. BPA was established by the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*, to market power from Bonneville Dam and to construct power transmission lines. As other federal dams and transmission lines were built in the Pacific Northwest, the combined generation and transmission facilities became known as the Federal Columbia River Power System (FCRPS). Revenues from BPA power sales must be sufficient to repay operating costs and all federal investments in the FCRPS. See 16 U.S.C. 832f, 838g, and 839e(a). BPA also markets electric power generated at two nuclear power plants in the Pacific Northwest: the DOE's Hanford Generating Project and the Trojan Nuclear Project. BPA owns 30% of the Trojan plant, while Portland General Electric Company (PGE) and Pacific Power & Light Company (PP&L), respectively, own the remaining 67.5% and 2.5% of the Trojan project. BPA wholesales electric power to 147 utilities, 11 direct-service industries, and various federal agencies in the Pacific Northwest region (Washington, Oregon, Idaho, that portion of Montana lying west of the Continental Divide, and small portions of Utah, Wyoming, and Nevada). See 16 U.S.C. 837 and 839a(14). .

Production of electric energy on the FCRPS varies from month to month, depending on the rainfall and the snowpack that accumulates in the Columbia River watershed. At times, large volumes of water may be available to generate electric power in excess of the demands placed on BPA by its Northwest customers. Once those needs have been satisfied, BPA is authorized to sell power outside that region, primarily to California. See 16 U.S.C. 837a. Energy sold to California utilities is transmitted via the Pacific Intertie transmission lines. When these lines are fully loaded, BPA

cannot transmit additional energy to California. However, water may still be available for hydroelectric power generation even after BPA has satisfied the demand for power in the Northwest and even if the Pacific Intertie is operating at its peak capacity. If this water is stored behind the federal dams, it may rise above the maximum levels permitted for flood control purposes. Accordingly, when reservoir levels are too high, water must be "spilled" over the dams without producing hydroelectric power. When this occurs, BPA forgoes the revenues from the sale of hydroelectric power that could have been used to repay the federal investment in the FCRPS. Alternatively, BPA may generate hydroelectric power to "displace" the energy generated at Northwest thermal generating plants, such as the Trojan nuclear power plant.[1] When these plants are shut down, BPA can avoid incurring variable production costs, which are principally fuel and certain operating costs.

b. In January 1983, based on snowpack surveys for the Columbia River watershed, reservoir measurements, and power demand forecasts, BPA anticipated a surfeit of water far in excess of the level necessary to generate electricity to satisfy all of the demands for BPA's power. At that time, the Pacific Intertie was fully loaded, and it was forecasted that the Intertie would remain in that condition for six months, preventing any further power sales to BPA's California customers. Without a market for additional energy, BPA would have been forced to spill the excess water over the dams. BPA projected that this situation would continue for six months. Pet. App. 9.

At the same time, BPA had fallen behind in its obligations to repay the Treasury's investment in the FCRPS. The national and Northwest economies were then in severe

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[1]DOE's Hanford nuclear plant is less likely to be displaced, since it is operated for national defense purposes.

recession, which had caused a serious reduction in BPA's power sales and, consequently, in its revenues. Pet. App. 3; *Portland General Electric Co.* v. *Johnson,* 754 F.2d 1475, 1478 (9th Cir. 1985). To meet its Treasury obligations, BPA searched for short-term emergency actions to increase its revenues and reduce its costs in a way that would not harm any of its customers. Pet. App. 10; *Portland General Electric Co.* v. *Johnson,* 754 F.2d at 1483.

The same studies that predicted a surfeit of water also demonstrated that BPA would not need its 30% share of the output from the Trojan nuclear power plant to meet energy demands during this period. If the Trojan plant were shut down, BPA would save approximately $3,720,000 in fuel and operating expenses. Pet. App. 3. However, BPA had no legal right to shut down the Trojan plant for this period; even if BPA chose not to receive its own share of Trojan output, PGE and PP&L could continue to receive their 70% aggregate shares. *Ibid.*[2] The continued operation of Trojan at a reduced level would yield only a negligible reduction in variable costs; in fact, perhaps no reduction at all would have resulted, because savings occur only when the plant is entirely shut down, since that permits a temporary reduction in the work force. Additionally, a nuclear plant must be entirely shut down in order to realize appreciable fuel savings. *Ibid.* Therefore, to shut down the plant BPA had to replace PGE's and PP&L's shares of Trojan's output. BPA could easily do so by generating hydroelectric power from the excess water that otherwise would have been spilled over the dams. However, given BPA's published rate for such energy (the NF-2 nonfirm energy rate), the replacement cost to PGE and PP&L would have been nearly $15.5

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[2]The Trojan operation agreement provides each owner with "scheduling rights," which entitle each owner to receive its full share of Trojan's operating capacity. Pet. App. 3.

million; conversely, BPA would have earned revenues of more than $15 million. Quite logically, the majority owners of the Trojan plant would not agree to incur these multi-million dollar losses so that BPA alone could profit.

Accordingly, to realize the $3,720,000 in savings from a temporary shut down of the Trojan plant, BPA, exercising its authority to enter into contracts (see 16 U.S.C. 832a(f)), purchased the scheduling rights to the plant from the majority owners and sold PGE and PP&L replacement power at BPA's published rate. Pet. App. 4.[3] This acquisition extended only from January 21 through April 30, 1983, which was well within the period during which the output of the Trojan project was not needed to supply the energy demands of BPA customers. *Ibid.* The contracts were not renewed after their expiration. By executing these contracts, BPA received more than $6.03 million in revenue. That revenue not only was used to repay some of BPA's debts to the federal Treasury, but also mitigated future rate increases for all of BPA's customers, including its customers in California. *Id.* at 9. Without the purchase of Trojan scheduling rights, the transaction could not have taken place.

c. To prevent this situation from recurring, BPA decided to adopt a generic rule applicable to all thermal generating plants in the Pacific Northwest, including the Trojan plant. BPA therefore held ratemaking proceedings under Section 7(i) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839e(i), to develop a generic rule governing the use of excess hydroelectric power during periods when BPA has a surfeit

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[3]PGE's scheduling rights were valued by first determining the total difference between PGE's net loss of $6,610,000 and BPA's total gain of $18,680,000, which is $25,290,000. This figure was divided in half, producing the $12,650,000 BPA agreed to pay PGE. PP&L's scheduling rights were valued on a pro rata basis, at $451,785.

of water in its reservoirs. Pet. App. 9-10. At the end of this 1983 rate proceeding, BPA adopted generic nuclear and coal-fired generating station displacement rates (Schedule NF-83). These rates now govern the shutdown of all thermal generating stations during periods when BPA has surplus energy. The nuclear displacement rate specifically applies to the Trojan nuclear plant. No similar contracts have been executed since the displacement rate was ordered into effect by the Federal Energy Regulatory Commission (FERC) on November 1, 1983. *United States Dep't of Energy—Bonneville Power Administration,* 25 F.E.R.C. ¶ 61,140.[4] Because of the time constraints involved, however, it was not possible for BPA to apply its generic rule to the Trojan contracts.

2. Petitioner California Energy Resources Conservation and Development Commission (CEC) is responsible for developing energy policies for the State of California. Cal. Pub. Res. Code § 25200 *et seq.* (West 1977). Petitioner challenged the Trojan contracts by filing a petition for review in the court of appeals. Petitioner alleged that the Trojan shutdown contracts had the effect of establishing new and lower rates for PGE and PP&L and therefore, petitioner argued, BPA could not execute the contracts without complying with the procedural ratemaking requirements of Section 7(i) of the Northwest Power Act, 16

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[4]On July 2, 1985, FERC exercised its authority under Section 7(a)(2) of the Northwest Power Act, 16 U.S.C. 839e(a)(2), to grant final confirmation and approval to the NF-83 nuclear and coal-fired power plant displacement rates. *United States Dep't of Energy—Bonneville Power Administration.* 32 F.E.R.C. ¶ 61,014. By coincidence, this approval was granted at the same time that FERC implemented BPA's successor NF-85 nuclear and coal-fired generating plant displacement rates at the conclusion of a second BPA rate hearing under Section 7(i) of the Northwest Power Act. *United States Dep't of Energy—Bonneville Power Administration,* 31 F.E.R.C. ¶ 61,388 (1985). On October 2, 1985, FERC denied a petition for rehearing filed by petitioner and others. *United States Dep't of Energy—Bonneville Power Administration,* No. EF84-2011-015.

U.S.C. 839e(i). In response, BPA argued that it had the authority to acquire the scheduling rights from its Trojan plant co-owners by virtue of BPA's broad contracting authority under Section 2(f) of the Bonneville Project Act, 16 U.S.C. 832a(f). Pet. App. 5. BPA also pointed out that all of its customers, including those in California, benefitted from the additional revenues that BPA had received by not spilling the excess water. *Ibid.* In fact, no BPA customer had (or has to date) ever registered any complaint about the Trojan shutdown contracts.

The court of appeals held that BPA's acquisition of its co-owners' Trojan scheduling rights had the effect of reducing the rates that PGE and PP&L paid for replacement energy. Pet. App. 8. Therefore, the court ruled that BPA generally should hold a hearing under Section 7(i) of the Northwest Power Act before entering into contracts of this sort. *Ibid.* However, the court also held that the "particular and unusual circumstances of this case" did not require BPA to hold a rate hearing before executing the contracts at issue here. Pet. App. 10. As the court explained, the Trojan shutdown contracts were short-term solutions to a revenue emergency, the transactions were voluntary, and none of BPA's customers, including the California utilities, was harmed in any way. *Id.* at 9-10. Accordingly, the court declined to invalidate the particular contracts involved in the Trojan shutdown. *Id.* at 10.[5]

ARGUMENT

In arguing that the court of appeals' judgment should be reviewed by this Court, petitioner overlooks the fact that the court of appeals ruled in petitioner's favor on the only

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[5]Given its ruling, the court of appeals did not consider the argument advanced by FERC that ratemaking proceedings were unnecessary because the challenged transaction amounted to a change in the rate schedule, rather than in the rates themselves. Pet. App. 9 n.1.

issue of any continuing importance to petitioner. The court held that, where mixed questions of contract and ratemaking are before BPA, the agency should afford interested parties the opportunity for a hearing under Section 7(i) of the Northwest Power Act, 16 U.S.C. 839e(i). Pet. App. 8. The court of appeals then recognized that the only remaining question was whether the particular contracts involved in this case must be invalidated. *Ibid.* The court declined to do so because the emergency conditions confronting BPA when it executed the contracts did not allow time for a hearing and because there was no showing that any party, including petitioner and any California utility, had been harmed in any way by the contracts. For several reasons, review by this Court of that aspect of the court of appeals' judgment is not warranted.

To begin with, given the court of appeals' ruling that BPA must conduct a hearing in the future in cases involving mixed issues of contract and ratemaking, and FERC's approval of BPA's adoption of a generic displacement rate, it is dubious that petitioner has standing to challenge the court of appeals' refusal to invalidate the contracts. Petitioner does not (and could not) claim that it has suffered any financial injury from the execution of the Trojan contracts or that it would receive any financial benefit from the invalidation of these contracts. In addition, the particular contracts at issue expired in 1983, and petitioner does not claim that their execution has had any lasting effect. Moreover, invalidation of the contracts would not necessarily require BPA to refund money to or receive a surcharge from PGE and PP&L. Accordingly, invalidation of these contracts would not benefit petitioner in the slightest.

The only claim of injury that petitioner can assert, and the only basis upon which the court of appeals found that petitioner had standing to bring this suit (see Pet. App. 7), stems from petitioner's inability to object to the execution of these particular contracts. However, FERC has now

approved BPA's generic displacement rate, which was adopted following a hearing at which petitioner was a party. In those proceedings, petitioner had the opportunity to engage in discovery, file direct, rebuttal, and surrebuttal testimony, present oral argument to the BPA Administrator, and file initial and reply briefs. See Procedures Governing BPA Rate Adjustments, 46 Fed. Reg. 11697 (1981), amended, 47 Fed. Reg. 6240 (1982). In 1985, petitioner again intervened in the BPA general ratemaking proceeding, which re-adopted the generic rule adopted in 1983. Given FERC's approval of BPA's generic rule, there would be no reason for BPA to conduct a hearing on the question whether BPA should retroactively adopt the Trojan contracts. Thus, since a ruling in petitioner's favor on the narrow question of whether the now-expired contracts should be retroactively invalidated would not provide petitioner with any relief, petitioner lacks standing to challenge the court of appeals' refusal to invalidate these particular contracts. See *Allen* v. *Wright,* No. 81-757 (July 3, 1984), slip op. 13 (citation omitted) ("relief from the injury must be 'likely' to follow from a favorable decision" in order for a party to have standing).

In any event, review by this Court of the court of appeals' decision is not warranted. In ruling that BPA's execution of the contracts without affording interested parties the opportunity for a hearing was justified given the emergency circumstances of this case, the court simply drew a parallel between this case and this Court's decision in *Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747 (1973). There, the Court held that the "opportunity for hearing" requirement found in Section 204(b) of the Federal Power Act, 16 U.S.C. 824c, did not require a hearing in every case because that requirement "would unduly limit the discretion the Commission must have in order to mold its procedures to the exigencies of the particular case * * *" (411 U.S. at 762).

See also *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Ass'n*, 356 U.S. 282, 287-288 (1958). The court of appeals thus merely applied this Court's common sense reading of other regulatory statutes to the compelling facts of this case. Without the contracts, which expired three months after execution, BPA would have lost millions of dollars in revenue and wasted millions of dollars in nuclear fuel. Pet. App. 9-10. Moreover, both during and after the term of the contracts, "BPA power continued to be available to all of BPA's customers at the rates, and according to the availability provisions, established in full rate-making proceedings." *Id.* at 10. The court of appeals' fact-bound ruling, which was expressly limited to the unique facts of this case, does not conflict with any decision of this Court or of any other court of appeals. There is no reason for further review.

Petitioner erroneously asserts (Pet. 15) that the emergency exception adopted by the court of appeals "will spawn unnecessary and counter-productive future litigation." As noted above, BPA has recently adopted generic nuclear and coal-fired generating station displacement rates (Schedule NF-83), and these rates now govern the shutdown of all thermal generating stations during periods when BPA has surplus energy. The nuclear displacement rate also specifically applies to the Trojan nuclear plant and has thus eliminated any need for future Trojan shutdown contracts similar to those involved here. The generic displacement rate does not contain an emergency exception, and BPA does not anticipate that it will resort to the emergency exception recognized by the court of appeals. Accordingly, since nuclear displacement rates have now become a regular topic for consideration in BPA rate proceedings, the question presented by petitioner will not recur.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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